No. 184.

Supreme Court of the United States

OCTOBER TERM, 1951.

THE STANDARD OIL COMPANY, AN OHIO CORPORATION,

Appellant,

vs.

JOHN W. PECK, TAX COMMISSIONER OF OHIO; JOHN J. CARNEY, AUDITOR OF CUYAHOGA COUNTY, OHIO,

Appellees.

Appeal from the Supreme Court of the State of Ohio.

BRIEF FOR APPELLEES.

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BRIEF FOR APPELLEES.

I.

STATEMENT OF THE CASE.

Ohio, as the state of domicil of the appellant, levied an ad valorem personal property tax on tow boats and barges used in interstate commerce on the inland waterways of the Mississippi and the Ohio rivers by the appellant, an Ohio corporation, for the tax years 1945 and 1946.

The record discloses that the tow boats and barges of the appellant were used by the appellant on the Mississippi and Ohio rivers to carry crude oil for its own use from various points in Louisiana and Tennessee to Bromley, Kentucky, and Mount Vernon, Indiana (R., 66, 67, 68).* The crude oil unloaded at Bromley, Kentucky, was for the refinery of the appellant at Latonia, Kentucky (R., 66). The crude oil unloaded at Mount Vernon, Indiana was transshipped by pipeline to refineries of the appellant located at Lima, Toledo and Cleveland, Ohio (R., 66, 69, 76). The tow boats and barges were used interchangeably in transporting crude oil from the various points in Louisiana and Tennessee to either Bromley, Kentucky, or Mount Vernon, Indiana (R., 102B).

The record also shows that the greater bulk of the crude oil transported by the appellant on the inland waterways of the Mississippi and Ohio rivers during the calendar years 1944 and 1945 was over three routes, Memphis, Tennessee, to Mount Vernon, Indiana; Memphis, Tennessee, to Bromley, Kentucky; and Gibson Landing, Louisiana, to Bromley, Kentucky (R., 66, 69, 102B). The total river mileage on the Ohio river, bordering on the state of Ohio, traversed by the loaded crude oil barges and the tow boats of the appellant, was seventeen and one-half (17½) miles (R., 76, 84).

Bromley, Kentucky, is four (4) miles down the Ohio river from Cincinnati, Ohio (R., 76, 86), from which city the tow boats and barges were registered (R., 79). After discharging cargo at Bromley, Kentucky, the boats of the appellant would from time to time dock at Cincinnati, Ohio, for provisions, fuel or minor repairs (R., 79, 80, 86). No cargo was taken on at Cincinnati, Ohio, by the appel-

* Reference to printed transcript of record.

lant during 1944 and 1945. The boats and barges of the appellant on the trips down the Ohio and Mississippi rivers carried no cargo (R., 84).

The record does not show the actual number of trips made by each tow boat and oil barge during 1944 and 1945 either to or from the various points in Louisiana, Tennessee, Kentucky or Indiana (R., 78). The record also is silent as to how much time each tow boat or barge actually spent in the various ports in Louisiana, Tennessee, Indiana or Kentucky. There is no evidence showing the turn-around time of the tow boats and barges, or the time it took to load or unload the oil barges at the various ports. There is no evidence showing that any particular tow boat or barge was continuously throughout the year in either the waters of Louisiana, Tennessee, Kentucky or Indiana or that a portion or average number of the tow boats and barges were continuously in the waters of any of the river states (Louisiana, Tennessee, Kentucky or Indiana) during the years 1944 or 1945.

The record shows that prior to the tax years involved in this cause the appellant did not challenge or question the right of the state of Ohio to levy and collect an ad valorem tax on tangible personal property similar to that involved in this case (R., 62, 63, 64). The record does not disclose that any other state actually has taxed any of the tow boats and barges of the appellant. However, there is a statement in the record by counsel for the appellant that the state of Kentucky has asserted a right to tax the tow boats and barges of the appellant on an apportionment basis (R., 63, 65).

II.

SUMMARY OF ARGUMENT.

Point 1.

The boats and barges of the appellant are subject to an ad valorem tax under Ohio statutes.

Sections 5325, 5328 and 5371 of the General Code of Ohio.

Point 2.

The due process of law clause of the Fourteenth Amendment of the Constitution of the United States does not prevent Ohio, as the domiciliary state, from levying a personal property tax on the boats and barges of the appellant, which have acquired no permanent situs elsewhere.

St. Louis v. Wiggins Ferry Company, 11 Wallace, 423, 20 L. Ed., 192 (1871);
Ayer and Lord Tie Company v. Commonwealth of Kentucky 202 U. S., 409, 50 L. Ed., 1082 (1906);
Old Dominion Steamship Company v. Virginia, 198 U. S., 299, 49 L. Ed., 1059 (1905).

(A) Boats and barges of appellant acquired no permanent situs outside of Ohio, on apportioned basis or otherwise.

(B) Northwest Airlines, Inc., v. Minnesota, 322 U. S., 292, 88 L. Ed., 1283 (1944), is applicable to case at bar and supports the tax imposed by Ohio on boats and barges of appellant.

III.

ARGUMENT.

Point 1.

The Boats and Barges of the Appellant Are Subject to an Ad Valorem Tax Under Ohio Statutes.

The taxation of the tow boats and barges of the appellant was pursuant to the provisions of Sections 5325, 5328 and 5371 of the General Code of Ohio. Boats are included in the legislative definition of the term "personal property" as used in the Ohio taxing statutes. The term "personal property" is defined in Section 5325 of the General Code of Ohio which, in so far as pertinent, reads as follows:

> "The term 'personal property' as so used, includes * * * also every share or portion, right or interest, either legal or equitable, in and to every ship, vessel, or boat, of whatsoever name or description, used or designed to be used either exclusively or partially in navigating any of the waters within or bordering on this state, whether such ship, vessel, or boat is within the jurisdiction of this state or elsewhere, and whether it has been enrolled, registered or licensed at a collector's office or within a collection district in this state or not."

Section 5328 of the General Code of Ohio provides in part as follows:

> "All ships, vessels and boats and shares and interests therein, defined in this title as 'personal property' belonging to persons residing in this state, * * * shall be subject to taxation".

Section 5371 of the General Code of Ohio, relating to the listing and assessing of personal property, provides in part as follows:

> "Ships, vessels, boats and aircraft, and shares and interests therein, shall be listed and assessed in the taxing district in which the owner resides."

Under the provisions of the foregoing statutes, boats belonging to a resident of Ohio are subject to personal property tax. The taxing authority and the Supreme Court of Ohio concluded that the boats of the appellant came within the purview of the foregoing statutes, particularly Section 5325 of the General Code of Ohio, since the boats and barges of the appellant, an Ohio corporation having its corporate and actual domicile in Ohio, were used in part in navigating the waters of the Ohio river bordering on the state of Ohio and also because there was no evidence in the record showing that the boats and barges were used exclusively in any other state. The conclusion of the Supreme Court of Ohio that the cited statutes applied to the boats and barges of the appellant is binding according to the cases of **Citizen National Bank, etc., v. Durr**, 257 U. S., 99, 108, 66 L. Ed., 149, 153 (1921), and **Guaranty Trust Company v. Blodgett**, 287 U. S., 509, 512, 513, 77 L. Ed., 463, 465 (1933).

Point 2.

The Due Process of Law Clause of the Fourteenth Amendment of the Constitution of the United States Does Not Prevent Ohio, as the Domiciliary State, from Levying a Personal Property Tax on the Boats and Barges of the Appellant, Which Have Acquired No Permanent Situs Elsewhere.

The tax imposed by Ohio is challenged by the appellant solely under the due process clause of the Fourteenth Amendment of the Constitution of the United States. This court has repeatedly held that vessels are taxable by the domiciliary state, except where the vessels are operated wholly on waters within another state, in which event the latter state and not the domiciliary state has jurisdiction to tax. Moreover, the right of the domiciliary state to tax vessels does not depend on the physical presence of such vessels within the state, the jurisdiction to tax being based primarily on the domicile of the owner within the taxing state. **St. Louis v. Wiggins Ferry Company**, 11 Wallace, 423, 20 L. Ed., 192 (1871); **Ayer and Lord Tie Company v. Commonwealth of Kentucky**, 202 U. S., 409, 50 L. Ed., 1082 (1906), and **Old Dominion Steamship Company v. Virginia**, 198 U. S., 299, 49 L. Ed., 1059 (1905).

(A) Boats and Barges of Appellant Acquired No Permanent Situs Outside of Ohio, on Apportioned Basis or Otherwise.

However, the appellant relying on the decision in **Ott, etc., et al., v. Mississippi Valley Barge Line Company et al.**, 336 U. S., 169, 93 L. Ed., 585 (1949), contends that Ohio, as the domiciliary state lost its jurisdiction to tax the full value of its boats and barges, because such tangible prop-

erty had acquired on an apportioned basis a taxing situs elsewhere. The record factually does not support the contention asserted by the appellant. There is no evidence in the record which shows that the boats and barges of the appellant in whole or in part were used exclusively in any state or were permanently in any state. Likewise there is no evidence showing that any average number of the boats and barges of the appellant were continuously, that is day to day, throughout the tax year, in either Louisiana, Kentucky, Tennessee or Indiana. The record only shows that the boats and barges of the appellant intermittently entered various ports in the states along the Mississippi and Ohio rivers for the purpose of loading or unloading crude oil for the use of the appellant in the ports located therein. In short, the record is devoid of any proof that the boats or barges of the appellant acquired a permanent situs for tax purposes apart from Ohio either because the boats or barges were used exclusively in any state or because an average number of the boats and barges were continuously, day by day, throughout the year, in another state.

The case of **Ott, etc., et al., v. Mississippi Valley Barge Line Company et al.**, 336 U. S., 169, 93 L. Ed., 585 (1949), approving and applying the rule of apportionment, announced in the railroad rolling stock cases (**Pullman's Palace Car Company v. Pennsylvania**, 141 U. S., 18, 35 L. Ed., 613 (1891); **Union Refrigerator Transit Company v. Kentucky**, 199 U. S., 194, 206, 50 L. Ed., 150 (1905); **Union Tank Line Company v. Wright**, 249 U. S., 275, 282, 63 L. Ed., 602, 609 (1919), and **Johnson Oil Refining Company v. Oklahoma, ex rel.**, 290 U. S., 158, 161, 162, 78 L. Ed., 238, 241, 242 (1933)) to boats and barges belonging to a foreign corporation and used by the foreign corporation, a cer-

tificated public carrier in interstate commerce on inland waterways, did so, on the basis that an average number of such boats were continuously throughout the year in the non-domiciliary state. The court assumed for the purposes of the case that some part of the vessels were daily in the state of Louisiana and the fact that the taxing statute applied only to an average number of vessels continuously in the state. That basis of the decision is emphasized by Mr. Justice Douglas in the opinion of the court at page 175:

> "Louisiana's Attorney General states in his brief that the statute 'was intended to cover and actually covers here, an average portion of property permanently within the State—and by permanently is meant throughout the year.'"

In short, the rule of law announced in the railroad rolling stock cases and followed and applied in **Ott, etc., et al., v. The Mississippi Valley Barge Line Company et al.**, 336 U. S., 169, 93 L. Ed., 585 (1949), is not applicable to the present case because it does not affirmatively appear from the record that any specific boat or barge or any average number of boats or barges of the appellant was or were continuously in any other state during the tax year, so as to be taxable in any other state. Consequently, in the face of the record, Ohio had jurisdiction as the domiciliary state to tax the full value of the boats and barges of the appellant.

(B) NORTHWEST AIRLINES, INC., V. MINNESOTA, 322 U. S., 292, 88 L. ED., 1283 (1944), IS APPLICABLE TO CASE AT BAR AND SUPPORTS THE TAX IMPOSED BY OHIO ON BOATS AND BARGES OF APPELLANT.

In the absence of any evidence in the present record that the boats and barges of the appellant were wholly or con-

tinuously and habitually used in another state, Ohio, as the domiciliary state had jurisdiction to tax such boats and barges. In view of the record, the case of **Northwest Airlines, Inc., v. Minnesota**, 322 U. S., 292, 88 L. Ed., 1283 (1944), rather than **Ott, etc., et al., v. Mississippi Valley Barge Line Company et al.**, 336 U. S., 169, 93 L. Ed., 585 (1949), is applicable to the case at bar, since none of the boats and barges of the applicant acquired an "actual situs" in any other state during the entire tax year, by being continually in such other state. The doctrine of tax apportionment for movable instrumentalities engaged in interstate commerce is inapplicable because as stated by Mr. Justice Frankfurter in the course of his opinion in **Northwest Airlines, Inc., v. Minnesota**, 322 U. S., 292, 88 L. Ed., 1283, 1287 (1944), at page 297:

> "But the doctrine of apportionment has neither in theory nor in practice been applied to **tax units of interstate commerce visiting for fractional periods of the taxing year.**" (Emphasis ours)
>
> . . . . . .
>
> "The continuous protection by a State other than the domiciliary State—that is, **protection throughout the tax year has furnished the Constitutional basis for tax apportionment in these interstate commerce situations**, and it is on that basis that the tax laws have been framed and administered." (Emphasis ours)

The right of Ohio, as the domiciliary state—the state which created the appellant and the state wherein the appellant has its corporate domicile and principal place of business—to levy a full ad valorem personal property tax on the boats and barges of the appellant used in interstate commerce, is fully recognized in **Northwest Airlines, Inc., v. Minnesota**, 322 U. S., 292, 88 L. Ed., 1283 (1944), which was mentioned in the opinion in **Ott, etc., et al., v. Mississippi Valley Barge Line Company et al.**, 336 U. S.,

169, 175, 93 L. Ed., 585, 590 (1949), but neither expressly modified nor limited therein in any way. Paraphrasing the language of Mr. Justice Frankfurter in the **Northwest Airlines, Inc., v. Minnesota**, 322 U. S., 292, 88 L. Ed., 1283, 1285, 1286 (1944), at pages 294 and 295, brings the case at bar within the test of benefits, relation and protection announced in **Wisconsin et al. v. J. C. Penney Company**, 311 U. S., 435, 444, 85 L. Ed., 267, 270 (1940), for determining whether a state tax statute violates the due process of law clause:

> "No other State is the State which gave (Standard Oil) the power to be as well as the power to function as (Standard Oil) functions in (Ohio); no other state could impose a tax that derives from the significant legal relations of creator and creature and the practical consequences of that relation in this case. On the basis of rights which (Ohio) alone originated and (Ohio) continues to safeguard, she alone can tax the personalty which is permanently attributable to (Ohio) and no other state." (Insertion ours)

The language of Mr. Justice Frankfurter in the same opinion at pages 297 and 298 also is pertinent as to the right and power of Ohio, as the state of domicile to tax the boats and barges of the appellant:

> "The taxing power of the domiciliary State has a very different basis. It has power to tax because it is the State of domicile and no other State is. For reasons within its own sphere of choice Congress at one time chartered interstate carriers and at other times has left the chartering and all that goes with it to the States. That is a practical fact of legislative choice and a practical fact from which legal significance has always followed. That far-reaching fact was recognized, as a matter of course, by Mr. Justice Bradley in his dissent in the Pullman's Palace Car Co. case, supra (141 US at 32, 35 L ed 619, 11 S Ct 876, 3 Inters Com Rep 595). Congress of course could exert

its controlling authority over commerce by appropriate regulation and exclude a domiciliary State from authority which it otherwise would have because it is the domiciliary State. But no judicial restriction has been applied against the domiciliary State except when property (or a portion of fungible units) is permanently situated in a State other than the domiciliary State. And permanently means continuously throughout the year, not a fraction thereof, whether days or weeks."

In the same opinion, Mr. Justice Frankfurter at page 295 pointedly stated that the fact that the taxpayer had paid personal property taxes upon "some proportion of its full value" on its movable personal property used in interstate commerce in several other states, did not "abridge the power of taxation of Minnesota", as the domiciliary state and the home state of the fleet of airplanes belonging to the taxpayer. In the case at bar, there is no showing that the appellant has paid a personal property tax on its boats or barges in any other State. However, assuming for the sake of argument, that it had, nevertheless, such payment would not deny or abridge the power of taxation of Ohio, as the domiciliary state. As stated by Mr. Justice Frankfurter in **Northwest Airlines, Inc., v. Minnesota**, 322 U. S., 292, 295, 88 L. Ed., 1283, 1286 (1944), at page 295:

> "The fact that Northwest paid personal property taxes for the year 1939 upon 'some proportion of its full value' of its airplane fleet in some other State does not abridge the power of taxation of Minnesota as the home State of the fleet in the circumstances of the present case."

The doctrine of tax apportionment by a non-domiciliary state applied to vessels engaged in interstate commerce in **Ott, etc., et al., v. Mississippi Valley Barge Line Company et al.**, 336 U. S., 169, 93 L. Ed., 585 (1949), does not con-

stitute a limitation on the power of Ohio, as the domiciliary state, to tax the boats and barges of the appellant, particularly in the factual circumstances of this case, since as stated by Mr. Justice Frankfurter in **Northwest Airlines, Inc., v. Minnesota,** 322 U. S., 292, 88 L. Ed., 1283, 1288 (1944), at pages 299 and 300:

> "To introduce a new doctrine of tax apportionment as a limitation upon the hitherto established taxing power of the home State is not merely to indulge in constitutional innovation. It is to introduce practical dislocation into the established taxing systems of the States."

IV.

CONCLUSION.

The judgment appealed from should be affirmed in the factual circumstances of this case on the basis of the decisions of this court in **St. Louis v. Wiggins Ferry Company**, 11 Wallace, 423, 20 L. Ed., 192 (1871); **Ayer and Lord Tie Company v. Commonwealth of Kentucky**, 202 U. S., 409, 50 L. Ed., 1082 (1906), and **Northwest Airlines, Inc., v. Minnesota**, 322 U. S., 292, 88 L. Ed., 1283 (1944).

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